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No. 389

In the Supreme Court of the United States

OCTOBER TERM, 1929

THE CHESAPEAKE & POTOMAC TELEPHONE COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The majority and dissenting opinions in the Court of Claims have not yet been reported. The majority opinion will be found at pp. 29–31 of the Record; the minority opinion at pp. 31–41.

JURISDICTION

The Court of Claims entered judgment in this case on June 10, 1929. (R. 41.) The petition for certiorari was filed September 10, 1929. (R. 42.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner entered into a contract, known as the General Supply Committee contract, with the Secretary of the Treasury, who was exclusively authorized by law to make such contracts (Act of June 17, 1910, c. 297, Sec. 4, 36 Stat. 468, 531), for the furnishing of telephone service to the various Executive Departments in the District of Columbia, including the War Department, during the fiscal year ending June 30, 1918. This contract, like preceding and subsequent similar contracts entered into between the Telephone Company and the Secretary of the Treasury, provided for only a nominal annual rental for the necessary private branch exchange switchboards, the principal revenue being derived from mileage charges upon station lines, charges for telephone stations, and local messages.

The question presented is whether the petitioner is entitled under the Dent Act (Act of March 2, 1919, c. 94, 40 Stat. 1272) to recover, as upon a contract implied in fact, compensation, not provided for in the General Supply Committee contract, covering the difference between the cost and salvage value of a large and costly private branch exchange switchboard which was installed in the War Department on June 22, 1918, to meet the telephone requirements of that Department growing out of the World War and which was gradually dismantled after the Armistice.

STATUTES

Section 4 of the Act of June 17, 1910, c. 297, 36 Stat. 468, 531 (U. S. C. Title 41, Sec. 7), providing inter alia, that telephone service for the various Executive Departments in the District of Columbia shall be contracted for by the Secretary of the Treasury annually, instead of by the several departments, is quoted in full on pages 10–12 of petitioner's brief and need not be here repeated.

The Dent Act (Act of March 2, 1919, c. 94, 40 Stat. 1272), under which this suit was brought, provides in Section 1:

> That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into, in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation * * * for the production, manufacture, sale, acquisition or control of equipment, materials or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not

been executed in the manner prescribed by law: * * *.

Section 2 of the Act, the only other material section, gives the Court of Claims jurisdiction where the claimant is dissatisfied with the Secretary's action.

STATEMENT

The following facts were found by the Court of Claims in its amended special findings:

On May 18, 1917, petitioner entered into a contract, known as the General Supply Committee contract, with the Secretary of the Treasury, who was exclusively authorized by law to make such contracts (Sec. 4, Act of June 10, 1917, *supra*), which provided that the petitioner would "at its own risk and expense, furnish telephone service to all, any, or either of the departments or other offices or establishments of the Government in the District of Columbia" for the fiscal year ending June 30, 1918, and would install and maintain the necessary telephone equipment at certain rates and rentals named therein. This contract was similar in all material respects to that entered into for the preceding fiscal year. Under these annual General Supply Committee contracts, petitioner furnished the necessary private branch exchange switchboards at a nominal rental of $24 per annum, its chief rental being derived from mileage charges upon station lines, charges for telephone stations, and local messages. (R. 13–14.)

The Mexican border troubles in 1916 and the unrestricted German submarine policy early in 1917 marked the beginning of increased telephone activities at the War Department. The three-position No. 4 switchboard then in use, equipped to handle two hundred and eighty lines, was replaced about a month before this country entered the World War by a five-position board. Although four additional positions were added to the board it proved inadequate, and on October 1, 1917, a twelve-position 604 type board, equipped to handle one thousand lines, was installed. Additions were made to this board and by the spring of 1918 it consisted of forty-two operators' positions, with equipment for forty-two hundred lines, which was about the limit to which this type of equipment could be expanded. (R. 17–18.)

By November, 1917, petitioner's officers foresaw that due to war conditions the requirements of the War Department for telephone service would exceed the line capacity of the No. 604 type switchboard and that it would be necessary to provide more adequate switchboard equipment. They accordingly conferred with John C. Scofield, Assistant to the Secretary of War and Chief Clerk of the War Department, and Arthur D. Scovell, Director of Telephones for the War Department, and also with a committee appointed by the Secretary of War to consider the question of the floor space which would be required for the new equipment. There being no space then available, the War Department decided

to erect a separate building, and the petitioner's officials cooperated with the War Department in the preparation of plans for such building. Petitioner also submitted to the Secretary of War blue prints showing on the floor plans of the proposed building, the location and arrangement of the switchboard equipment it planned to install. These plans were approved and returned to the petitioner, and petitioner gave final orders to the manufacturers for the proposed switchboard and equipment. Petitioner's District Manager then consulted with petitioner's Chief Engineer who had been sent down from New York to take charge of the Government situation and to whom the District Manager reported, and "told him the whole installation ought to be held up until they got a written order." The Chief Engineer, however, objected to such a course and told the District Manager that "they wanted to do everything possible for the Government, and would take their chances of getting paid," and notified the District Manager "to go ahead with the installation." Prior to installing the switchboard and equipment, petitioner advised Mr. Scofield, Chief Clerk of the War Department, and also Mr. Scovell, Director of Telephones for the War Department, "that it expected the Government to pay the cost of the new switchboard less salvage." The pertinent findings are, however, that Mr. Scovell "had no power to bind the Government in the matter of contract and was not in any sense a contracting officer," that "Mr. Scofield

never represented to plaintiff's representative that the War Department would pay for the installation or costs of or losses on the new switchboard, nor did he prior to the installation notify the plaintiff that he would not pay for the same," that the Secretary of War "made no agreement with plaintiff to pay for the switchboard, never personally authorized such payment, never heard it suggested, and did not know until after the armistice that plaintiff contemplated submitting claim for the same;" and that neither the Secretary of War nor Mr. Scofield at any time approved payment for the switchboard, and "the War Department did not recognize the claim of an agreement with plaintiff to pay for the switchboard other than by way of the usual rental provided for in the General Supply Committee contract." (R. 19–22, 25.)

The building to house the new switchboard and equipment was erected by the War Department at a cost of $138,000, the petitioner contributing $8,000 to avoid any impairment in the construction. This was in line with the previous practice as the petitioner "had always theretofore provided at its own expense the necessary telephone switchboard and equipment for use at the War Department," and the Government "had always provided the necessary space for such switchboards and equipment." (R. 19.)

The new board was installed and service transferred to it on June 22, 1918. (R. 22–23.) For transferring the service to the new building peti-

tioner submitted to the War Department a bill for $35,917.05 which stated that it covered the cost of labor and material involved in accordance with the provisions of the General Supply Committee contract. The War Department paid the bill. (R. 23–24.)

Like the switchboards theretofore used in the War Department, the new switchboard (called in the Findings a "No. 1" switchboard) although larger, more costly, and of a different type, was a common battery private branch exchange switchboard and possessed the same general features as the preceding board. It was a forty-five position board, cost $401,113.34, was expanded by the time of the Armistice to a seventy-five position board, and served the sixty-five buildings in the District of Columbia in which the War Department was housed during the war. (R. 22–25, 28.)

Nine days after the new board was installed, the new General Supply Committee contract for the fiscal year beginning July 1, 1918, became effective. This contract was similar in most respects to the preceding contracts. It provided, however, for increased rates, including an additional switchboard charge for multiple jacks which amounted to $10,153.56 for the succeeding twenty-nine months the new board was in service. (R. 16–17, 24.)

After the new switchboard was installed, petitioner continued to submit bills to the War Department on the same rental basis of $24 per year as

it had in the case of the old switchboard. (R. 23–24.)

The revenue received by the company under the General Supply Committee contracts increased from $5,714.77 for the year ending June 30, 1917, to $338,824.60 for the year ending June 30, 1919. The gross revenue, excluding long distance tolls during the period in which the switchboard was in service, aggregated $534,418.83. The long distance tolls for incoming and outgoing calls for that period approximated $964,248, the bulk of which went to the American Telegraph and Telephone Company and its other subsidiaries of the Bell System. (R. 27.)

The company's net loss on the new switchboard was $135,691.57, if separated from the total revenue under the General Supply Committee contracts. (R. 29.)

The American Telegraph and Telephone Company, of which petitioner is a subsidiary, regarded the problem of increased telephone service at the War Department to be largely its own and not solely that of the petitioner, and in 1919 it contributed to petitioner an amount sufficient to cover its loss upon the switchboard in question as well as on other war time equipment. (R. 20, 25–26.)

After the Armistice the telephonic needs of the War Department began to decrease and the switchboard was gradually dismantled. On January 1, 1921, it was completely removed. (R. 23.)

In accordance with the Dent Act, petitioner submitted a claim to the War Department for the difference between the cost and salvage value of the switchboard. This claim was rejected by both the Board of Contract Adjustment and the Secretary of War. (R. 28.) The Court of Claims, with two judges dissenting, likewise held that petitioner was not entitled to recover.

ARGUMENT

Section 4 of the Act of June 17, 1910, *supra*, provides specifically that telephone, electric light and power service for the various executive departments in the District of Columbia shall be obtained by the Secretary of the Treasury upon annual contract, instead of by the several departments. The two clauses upon which petitioner relies as qualifying the Secretary's power, viz, "when the public exigencies do not require the immediate delivery of the *article*," and "*Provided*, that the *articles* intended to be purchased in this manner are those in common use or suitable to the ordinary needs of two or more such departments or establishments," have, we submit, no reference to the obtaining of telephone, electric light and power service. The "articles" to which those clauses relate are specifically mentioned: fuel, ice, stationery, and other miscellaneous supplies. Telephone service, electric light service and power service are covered specifically in a subsequent clause of the same section. It therefore appears that the Secretary of

the Treasury had the sole authority to contract for such telephone service as was required by the various executive departments in Washington, including the War Department.

Pursuant to the statute, the Secretary of the Treasury, after the United States had entered the war, made a contract with the petitioner for the fiscal year ending June 30, 1918, during which year the switchboard in question was installed, which leaves no doubt that it was intended to cover all telephone service for all of the executive departments in Washington, including the necessary equipment. It provides specifically that the petitioner "will, at its own risk and expense, furnish telephone service to all, any, or either of the departments or other offices or establishments of the Government in the District of Columbia, for a term of one year beginning July 1, 1917," and that petitioner "will install, equip, and maintain such telephone equipment as may be required in the District of Columbia, and furnish service in connection therewith" at certain specified rates and rentals. (R. 13–14.) Private branch exchange switchboards were furnished at a nominal rental of $24 per annum, but the findings explain that this was because it was the policy of petitioner to look for its principal revenue to other sources—mileage charges upon station lines, charges for telephone stations, and local messages. (R. 13.)

Petitioner contends, however, that as the switchboard was unusual in size, type and cost, it was not

such a board as was contemplated by the General Supply Committee contract, and that as the Government used the board, though without promise of payment, after the petitioner had advised the War Department that it would expect payment for the same, there arose an agreement implied in fact on the part of the Government to pay the cost of the board, less the salvage value thereof.

The findings show, however, that the switchboard, though larger and of a different type than the preceding switchboards, was still a private branch exchange switchboard possessing the same general features as the one it replaced; that after the switchboard was installed the petitioner billed the War Department for the board at the same nominal annual rental of $24; that the petitioner pursuant to the terms of the General Supply Committee contract collected from the Government $35,000 for changing the switchboard service from the old board to the new one; that it may be presumed that the parties intended to meet the emergency telephone expenditures of the petitioner by way of increases in rates rather than by the Government paying the cost of the equipment less salvage, as evidenced by the new General Supply Committee contract which became effective nine days after the switchboard was installed; that in erecting a building to house the equipment the Government was fol'owing a well-established policy, viz, that the Government should provide the necessary space, and the petitioner should at its own ex-

pense furnish the switchboard and equipment; and that because of the large revenues involved, and the importance of adequate communication with the seat of war, the Bell system, of which petitioner was a subsidiary, regarded the problem of increased service at the War and other Departments as much its own as that of the Government.

Furthermore, all switchboards and telephone service had been previously secured and paid for only under the terms of the General Supply Committee contract. After petitioner advised the War Department that the new and larger switchboard would be necessary to meet its increased telephone requirements, petitioner's officials informed Mr. Scofield that they would expect payment of the cost of the board less salvage, but Mr. Scofield made no promises in the matter. One of the telephone officials suggested that the whole installation should be held up until a written order for same could be obtained from the War Department, but on failure to secure such an order it was decided that "they * * * would take their chances of getting paid," and petitioner proceeded with the installation. (R. 21.) These facts negative any suggestion that there was a tacit or implied agreement to pay for the switchboard even on the theory of silence. True, the War Department used the switchboard, but only in the same manner that it had used all preceding switchboards. (R. 24.)

Assuming that he would have had such authority, despite the Act of June 17, 1910, there is no show-

ing in the findings that any responsible official of the War Department either ordered the installation of the switchboard, or gave any promise to the petitioner that the Government would pay for it. The findings at most show nothing more than a mere approval of the location and arrangement of the board. As the Court of Claims has said (R. 30–31):

> It is * * * clear from the facts found that the Secretary of War made no agreement with the plaintiff to pay for the switchboard, never authorized such payment, never heard it suggested, and did not know that the plaintiff contemplated submitting a claim for the same until after the armistice. Mr. Scofield, who, if anyone under the Secretary of War, had authority to make such a contract, never stated to plaintiff's representative that the War Department would pay for the installation of or losses on the new switchboard, and the department never recognized the claim of an agreement with the plaintiff to pay for the switchboard other than by way of the usual rental provided for in the general supply contract.

The only other War Department official named in the findings is Mr. Scovell, Director of Telephones, and the findings show specifically that he "had no power to bind the Government in the matter of contract and was not in any sense a contracting officer." (R. 20.)

To recover under the Dent Act, the burden was upon the petitioner to establish a contract implied

in fact as distinguished from one implied in law. *Baltimore & Ohio R. R. Co.* v. *United States,* 261 U. S. 592, 596. It is submitted that under the findings petitioner has failed to sustain that burden.

Much of the reasoning of the minority opinion is based upon evidence not embodied in the findings of fact. It is well settled that the evidence may not be resorted to for the purpose of "eking out, controlling or modifying" the scope of the findings of the Court of Claims. *Brothers* v. *United States,* 250 U. S. 88, 93.

CONCLUSION

The case was rightly decided below and presents no question justifying review on certiorari. The petition for certiorari should therefore be denied.

Respectfully submitted.

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